STATE OF MICHIGAN

COURT OF APPEALS

CANDIS DOVER,

Plaintiff-Appellant,

v

WESTCHESTER LIMITED DIVIDEND HOUSING ASSOCIATION, L.L.C., a/k/a WESTCHESTER TOWER APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
April 25, 2006

No. 258654
Wayne Circuit Court
LC No. 03-337289-NO

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff, Candis Dover, appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS

Plaintiff tripped and fell over a garden hose on a sidewalk outside her apartment building, owned and operated by defendant Westchester Limited Dividend Housing Association, L.L.C., a/k/a Westchester Tower Apartments ("Westchester"), sustaining injuries to her back, hand and shoulder. On appeal, plaintiff argues that genuine issues of material fact exist regarding Westchester's notice of the lack of lighting and the location of the garden hose on the sidewalk that caused plaintiff to trip and fall. Plaintiff also argues that the trial court erred in allowing Westchester to avail itself of the open and obvious defense in order to avoid liability for violation of MCL 554.139, and that, alternatively, a sufficient factual dispute exists regarding whether the garden hose was an open and obvious condition or whether special aspects exist making the condition unreasonably dangerous.

II. STANDARD OF REVIEW

We review de novo a trial court's grant of a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden*

v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, supra* at 183.

III. ANALYSIS

Plaintiff argues that defendant should have noticed the garden hose on the sidewalk that created a dangerous condition. We disagree.

A. Notice

A premises owner owes a high duty of care to an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). The landowner has a duty to warn the invitee of any dangers, and to make the premises safe for the invitee by inspecting the premises and making any necessary repairs or warn of any discovered hazards. *Id.* at 597. Further, a premises owner has a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by a dangerous condition of the land that the owner knows or should know the invitees will not discover, realize or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

A premises owner is liable for injury resulting from an unsafe condition where the condition is of such a character or has lasted for a sufficient length of time that the premises owner should have had knowledge of it. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). "[C]onstructive notice arises not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1965). A landowner is also liable to invitees for injuries incurred on his premises where the injury results from an unsafe condition caused by the active negligence of the landowner or his employees. *Hampton, supra* at 604, citing *Berryman v Kmart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), quoting *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968).

In the present case, plaintiff has failed to produce evidence raising a material issue of fact regarding Westchester's actual or constructive knowledge of the condition. *Stitt, supra* at 596 (citing Restatement Torts, 2d, § 343). No evidence provided by plaintiff indicated Westchester's ownership of the garden hose or how the garden hose ended up on the sidewalk. Plaintiff also failed to produce evidence of the length of time the garden hose remained on the sidewalk prior to plaintiff tripping over it. Plaintiff testified she did not know where the garden hose came from, and that no one at the apartment complex knew where the garden hose came from. Both Westchester employees testified they did not know to whom the garden hose belonged and that neither had seen a garden hose on the sidewalk at the location of plaintiff's fall. No evidence was submitted that the condition was created by the negligence of Westchester or Westchester's employees. Plaintiff supports her contention Westchester had constructive knowledge of the condition by testifying she saw a similar garden hose near the site of her fall, and that only the maintenance employees of Westchester had access to garden hoses at the apartment complex. However, evidence was submitted that outside landscape contractors had access to the grounds of the apartment complex where plaintiff fell. To infer Westchester's actual or constructive possession of the garden hose based on the evidence submitted by plaintiff would be "conjecture." *Berryman, supra* at 92.

On the independent basis that plaintiff has failed to create a genuine issue of material fact regarding Westchester's actual or constructive knowledge of the condition, Westchester is not subject to liability for plaintiff's injuries. *Stitt, supra* at 596.

B. Statutory Duty

Plaintiff argues material facts remain whether Westchester breached covenants imposed by MCL 554.139, and, therefore, Westchester cannot avail itself of the open and obvious doctrine to shield itself from liability. MCL 554.139 provides, in relevant part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.

Westchester argues that plaintiff failed to specifically plead a violation of MCL 554.139 in her complaint. However, plaintiff did include allegations that Westchester violated certain statutory duties. Additionally, plaintiff raised the issue of Westchester's violation of MCL 554.139 in her brief in response to Westchester's motion for summary disposition and at the hearing of Westchester's motion. Therefore, the issue is properly before this Court on appeal. *Adam v Sylvan Glynn Golf Course,* 197 Mich App 95, 98; 494 NW2d 791 (1992).

Plaintiff is correct in her assertion that the open and obvious doctrine does not operate as a bar to a landlord's violation of a statutory duty. *O'Donnell v Garasic,* 259 Mich App 569, 581; 676 NW2d 213 (2003). A landlord is under a duty to repair "all defects of which he knew or should have known." *Raatikka v Jones,* 81 Mich App 428, 430; 265 NW2d 360 (1978). A landlord does not have a duty to inspect the premises on a regular basis to determine if any defects exist. *Id*. at 430-431. A landlord does have to repair any defects brought to his attention by the tenant and repair any defects found by his casual inspection of the premises. *Id.*

Plaintiff has not produced any evidence that, prior to her fall, she or any other tenant informed Westchester of either the light burned out near the site of her fall or the presence of a garden hose near the entrance of the apartment complex. Plaintiff had several complaints about the apartment complex, but never voiced them to the apartment manager. Further, plaintiff did not present evidence that Westchester discovered the burned out light bulb or the garden hose on the sidewalk during a "casual" inspection of the building. No evidence was set forth that any

maintenance person inspected the building and noticed the burned out light or the garden hose prior to plaintiff's fall. As set forth *supra*, Westchester did not have actual or constructive knowledge of the existence of a garden hose on the sidewalk prior to the accident.[1] The trial court properly granted summary disposition of plaintiff's claim that Westchester breached its statutory duty on the basis that no evidence created a genuine issue of material fact regarding whether defendant failed to maintain the common areas fit for the use intended by the parties. MCL 554.139.

C. Open & Obvious

Plaintiff further argues that the trial court erred in ruling that the garden hose on the sidewalk was not open and obvious or that special aspects existed to make it unreasonably dangerous. We disagree.

A premise owner "is not required to protect an invitee from [an] open and obvious danger." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if "special aspects of a condition make even an open and obvious risk unreasonably dangerous, [then] the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517. If special aspects do not exist, the open and obvious condition is not unreasonably dangerous. *Id*. at 517-519. Both the special aspects and open and obvious analysis are objective, "i.e., the fact finder should utilize a reasonably prudent person standard." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004).

In the present case, the garden hose on the sidewalk by itself was an open and obvious condition. A reasonably prudent person would have been able to see the garden hose on the sidewalk upon casual inspection. Plaintiff argues that darkness caused her to not see the garden hose on the sidewalk. While plaintiff testified she did not see the garden hose prior to her fall, she and her son readily identified it lying on the ground after her fall. Plaintiff had to remove it from her ankle and could see enough of the garden hose to describe it in sufficient detail. Additional, uncontraverted evidence showed that six lights near the front entrance to the apartment complex, where plaintiff fell, illuminated the location in excess of the minimum required by the local building code. The proper focus is on whether a reasonable person would have foreseen the danger, not whether plaintiff should have known the condition was hazardous. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). It is reasonable to assume

[1] We note that the lack of notice in this case renders inapplicable this Court's recent decision in *Benton v Dart Properties*, ___Mich App ___; ___NW2d___ (2006), which held that the open and obvious doctrine cannot bar a claim against a landlord for violation of the statutory duty to maintain the interior sidewalks in a condition fit for the use intended under MCL 554.139.

that had plaintiff looked down as she approached the entrance, she would have seen the garden hose on the sidewalk. Nothing covered the garden hose or obstructed plaintiff's view of the garden hose. Plaintiff was able to clearly see the garden hose after her fall regardless of the allegedly dark conditions. Viewing the evidence in a light most favorable to plaintiff, a reasonable person would have been able to watch the sidewalk and see the garden hose as they were walking toward the entrance to the apartment complex.

Further, it cannot be said that special aspects made the garden hose unreasonably dangerous. *Lugo, supra* at 517. A special aspect exists when, although the danger is open and obvious, it is unavoidable or imposes a "uniquely high likelihood of harm or severity of harm." *Id*. at 518-519. If a special aspect of the open and obvious condition makes the condition unreasonably dangerous, the condition is then removed from the open and obvious doctrine, and the premise owner can be held liable. See *Id*. at 519. Plaintiff alternatively argues that the lack of lighting created a special aspect making the garden hose on the sidewalk unreasonably dangerous. The darkness in the area of plaintiff's fall was not a special aspect. *Id*. at 518-519. The garden hose was neither unavoidable nor did it create a high likelihood of injuring plaintiff or injuring plaintiff severely. Plaintiff could have walked on the driveway or another part of the sidewalk when approaching the entrance to the apartment complex. Plaintiff could have stepped over the garden hose or moved it to the side of the walkway before proceeding. Moreover, a garden hose on a sidewalk does not create a high likelihood of harm or severity of harm. The fact finder must consider the condition of the premises, not "the condition of the plaintiff." *Mann, supra* at 328-329. While plaintiff incurred extensive injuries from her fall over the garden hose, a reasonable person falling over a garden hose and onto the ground would not suffer severe harm. The condition does not create a high likelihood of harm. Therefore, no special aspects existed to make the garden hose unreasonably dangerous.

Affirmed.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello